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December 15, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with
BellSouth*
Docket No. 99-00662

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Post-Hearing Brief. Copies of the enclosed are being provided to counsel of record for MCI.

Very truly yours,

A handwritten signature in black ink, appearing to be "Guy M. Hicks", written over a horizontal line.

Guy M. Hicks

GMH:ch
Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee**

**In Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with
BellSouth***

Docket No. 99-00662

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
POST-HEARING BRIEF**

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Post-Hearing Brief in this proceeding, which involves the interpretation of a voluntarily negotiated interconnection agreement ("Agreement") between BellSouth and MCImetro Access Transmission Services, Inc. ("MCI"). The sole question to be decided is whether BellSouth and MCI shared a common intent (mutually agreed) to pay reciprocal compensation for Internet Service Provider traffic ("ISP-bound traffic"). Based on the plain language of the Agreement, the legal and regulatory framework within which the Agreement was executed, and the extrinsic evidence of intent, BellSouth submits that the Tennessee Regulatory Authority ("TRA") must answer the question in the negative.

II. REGULATORY BACKGROUND

Until this decade, local telephone exchange service (completing calls across town) and exchange access service (connecting providers of long-distance service to their subscribers) were generally provided in a given area by a single, highly

regulated company such as BellSouth. Congress passed the 1996 Act to open local telecommunications markets to real and sustainable competition.

To encourage competition, the 1996 Act established rules to ensure that competing telephone companies are able to “interconnect” their respective networks. Interconnection enables callers who, for example, subscribe to MCI’s local telephone service to receive calls from, and place calls to, individuals who subscribe to BellSouth’s service.

Under the 1996 Act’s interconnection rules, all local exchange carriers (“LECs”) are required “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). In basic terms, “reciprocal compensation” works as follows. When a customer of Carrier A places a call to a customer of Carrier B in the same local area, Carrier A pays Carrier B for “terminating,” or completing, that local call. Similarly, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A. Reciprocal compensation is generally computed on a minutes-of-use basis.

Soon after the 1996 Act was passed, the Federal Communications Commission (“FCC”) made plain that the duty to pay reciprocal compensation was limited to local calls. “[S]ection 251(b)(5) reciprocal compensation obligations should apply only to traffic that *originates and terminates within a local area*”; those obligations “*do not* apply to the transport or termination of *interstate or*

*intrastate interexchange traffic.” Local Interconnection Order,*¹ 11 FCC Rcd at 16013, ¶ 1034 (emphases added). That ruling is embodied in regulations that provide that LECs “shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic” (47 C.F.R. § 51.703(a)), with “local telecommunications traffic” defined as traffic that “originates and terminates within a local service area established by the state commission” (*id.* § 51.701(b)(1)).

In February 1999, the FCC interpreted the 1996 Act’s reciprocal compensation requirement as it relates to Internet-bound traffic. The FCC’s decision squarely held that the statutory reciprocal compensation duty does *not* apply to Internet-bound traffic precisely because that traffic is not local — that is, it does not both originate and terminate in the same local calling area. *See ISP Declaratory Ruling*,² 14 FCC Rcd at 3706, ¶ 26 n.87.

The FCC’s analysis was grounded in the basic reality of Internet communication: To contact the Internet, an end-user typically dials a seven- or ten-digit number to access an Internet service provider (or “ISP”), who may have some

¹ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (“*Local Interconnection Order*”), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev’d in part, aff’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

² Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP Declaratory Ruling*”), *vacated and remanded*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

facilities located in the same local calling area. The call does not terminate at those local facilities, however. Rather, the ISP acts as a conduit, routing communications to the distant Internet site the end-user wishes to visit.

The key point to the FCC was that an Internet communication's ultimate termination point — the distant website — is outside the local calling area; accordingly, the FCC found that this traffic is not "local" under its rules. The FCC stressed that it has long "determined the jurisdictional nature of communications by the end points of the communication" and "rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." *ISP Declaratory Ruling*, 14 FCC Rcd at 3695, ¶ 10. Application of that rule to the Internet context led directly to the conclusion that Internet-bound calls "*do not terminate at the ISP's local server . . . but continue to the[ir] ultimate destination or destinations, specifically at a[n] Internet website.*" *Id.* at 3697, ¶ 12 (emphasis added).

In March 2000, the D.C. Circuit vacated the *ISP Declaratory Ruling* for lack of sufficient explanation. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Although the petitioners in that case — including the parent company of Petitioner MCI — had asked the court to rule that Internet-bound traffic terminates at the ISP and is therefore subject to reciprocal compensation, the court declined to do so. Instead, the court simply faulted the FCC for several explanatory "gaps" in its order. *See id.* at 9 (vacating and remanding "[b]ecause the Commission has not provided a satisfactory explanation"). In particular, the FCC had, in the court's

view, failed adequately to explain why its prior decisions adopting an end-to-end analysis to determine the jurisdictional nature of communications should control the characterization of communications traffic for reciprocal compensation purposes. *See id.* at 6-8.

The FCC currently has a proceeding underway to provide further explanation addressing the D.C. Circuit's concerns. *See TRDaily, Strickling Believes FCC Can Justify Recip Comp Ruling in Face of Remand*, Mar. 24, 2000 (stating that Chief of FCC's Common Carrier Bureau "still believes calls to ISPs are interstate in nature and that some fine tuning and further explanation should satisfy the court that the agency's view is correct"). The FCC, moreover, has already concluded in a separate proceeding — a proceeding not affected by the D.C. Circuit's order — that end-to-end analysis applies not only to jurisdictional issues, but also to *substantive* determinations relevant to the treatment of Internet-bound communications under the 1996 Act. *See Advanced Services Remand Order*,³ 15 FCC Rcd at 392, ¶ 16 (finding that Internet-bound traffic was not local for purposes of the Act's substantive definitions because "typically ISP-bound traffic *does not originate and terminate within an exchange* and, therefore, does not constitute telephone exchange service within the meaning of the [1996] Act") (emphasis added).

The obligations that the 1996 Act places on "incumbent local exchange carriers" — companies such as BellSouth that generally held exclusive franchises

³ Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999) ("*Advanced Services Remand Order*").

before the passage of the 1996 Act — are determined in the first instance through federally mandated negotiations with “competitive local exchange carriers” — companies such as MCI that presumably seek to enter the local market. *See* 47 U.S.C. § 252(a). One of the issues to be decided in those negotiations is the terms under which the two carriers will provide reciprocal compensation to one another. If the parties cannot agree on that issue (or on any other term), the relevant State public utility commission may be called upon to arbitrate that dispute. *Id.* § 252(b).⁴ Whether or not the State commission is asked to arbitrate any particular terms of the agreement, the entire resulting “interconnection agreement” must ultimately be approved by the State commission for it to be effective. *Id.* § 252(e)(1).

Once a State commission has approved an interconnection agreement, the 1996 Act also grants the State commission the authority to interpret and enforce the agreement’s terms. *See MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, Nos. 98-2127 *et al.*, 2000 WL 1010863 (7th Cir. July 24, 2000); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff’d in part, rev’d in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). All determinations of a State commission under the 1996 Act — both approval

⁴ If a State commission declines to arbitrate, the FCC must step in and conduct the proceedings. 47 U.S.C. § 252(e)(5).

decisions and enforcement decisions — are subject to review in federal court for consistency with the Act. See 47 U.S.C. § 252(e)(6).

III. ARGUMENT

In asserting its claim that BellSouth has breached the parties' Agreement, MCI bears the burden of proving the existence of an obligation on the part of BellSouth to pay reciprocal compensation for ISP traffic under the Agreement. See, e.g., *Custom Built Homes v. G.S. Hinsden Co., Inc.*, 1998 Tenn. App. LEXIS 89 (Tenn. Ct. App. Feb. 6, 1998) (party asserting breach of contract has burden of establishing existence of enforceable contract and nonperformance amounting to a breach of contract); *Van Eman v. Keuffel & Esser of New Jersey, Inc.*, 1988 Tenn. App. LEXIS 388 (reversing award of damages for breach of contract when plaintiff failed to carry his burden of proof "in establishing his allegation of breach of contract"). MCI has failed to carry that burden. Indeed, MCI's entire argument relies upon a "two-call theory" that has been discredited by the FCC on at least two occasions. Therefore, based on the plain language of the Agreement, the legal and regulatory framework within which the Agreement was executed, and the extrinsic evidence of intent, the TRA should find that BellSouth and MCI did not mutually agree to pay reciprocal compensation for ISP-bound traffic.

A. THE MCI/BELLSOUTH INTERCONNECTION AGREEMENT

Under the plain language of the MCI/BellSouth Interconnection Agreement, ("Agreement") the parties agreed to pay reciprocal compensation only for local traffic. Specifically, Attachment IV, Section 2.2.1 of the Agreement provides:

Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. Of [SIC] BellSouth's General Subscriber Service Tariff.

This provision tracks the discussion of this issue in both the FCC's 1996 Order and the prior Notice of Proposed Rulemaking on this issue;⁵ it likewise mirrors the definition of "local telecommunications traffic" set out in the FCC's rules. See 47 C.F.R. § 51.701(b)(1).

Other language in the agreement makes clear that the parties intended that their reciprocal compensation obligations would be consistent with, and not go beyond, federal law. For example, the Agreement expressly provides that "this Agreement shall be implemented consistent with the applicable rules and regulations of the FCC and the state regulatory body *in effect*." (emphasis added) (Part A, General Terms and Conditions, § 6) It is not a coincidence that the language the parties used in the Agreement to describe their reciprocal compensation obligations matches *almost to the word* the language of applicable FCC orders and regulations. Further, the parties never discussed any substantive terms of the Agreement, and MCI did not question BellSouth as to what those terms meant. (Martinez, Direct at 5.)

⁵ The FCC had noted that section 251(b)(5) "appears at least to encompass telecommunications traffic that *originates on the network of one LEC and terminates on the network of a competing LEC in the same local service area*." Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 14171, 14249, ¶ 230 (1996) ("*Local Interconnection NPRM*").

B. CONTRACT INTERPRETATION UNDER TENNESSEE LAW

The cardinal rule in interpreting a contract is to ascertain the intention of the parties from the contract as a whole and to give effect to that intention consistent with legal principles. *Winfree v. Educators Credit Union*, 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995); *Rainey v. Stansell*, 836 S.W.2d 117, 118 (Tenn. Ct. App. 1992). All provisions of a contract should reasonably be construed in harmony with each other so as to avoid repugnancy between the several provisions of a single contract. *Union Planters Nat'l Bank v. American Home Assurance Co.*, 865 S.W.2d 907, 912 (Tenn. Ct. App. 1993). In arriving at the intention of the parties to a contract, the intentions as actually embodied and expressed in the contract as written are critical, not the parties' state of mind at the time the contract was executed. *Id.*

In addition to the plain language of the contract, the intention of the parties must be determined by reference to the subject matter of the contract, the circumstances surrounding execution of the contract, and the construction placed on the contract by the parties in carrying out its terms. *Penske Truck Leasing Co., L.P. v. Huddleston*, 795 S.W.2d 669 (Tenn. 1990); *New Life Corp. of America v. Thomas Nelson, Inc.*, 932 S.W.2d 921 (Tenn. Ct. App. 1996); *see also Stovall v. Dattel*, 619 S.W.2d 125, 127 (Tenn. Ct. App. 1981) (in construing a contract, court must consider the "situation involving the parties, the nature of the business in which they are engaged and the subject matter to which the contract relates").

A court may consider such evidence even in interpreting an unambiguous contract.

As the Tennessee Supreme Court has explained:

The court in interpreting words or other facts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation *even to an agreement that on its face is free from ambiguity, it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into* -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.

Hamblen County v. City of Morristown, 656 S.W.2d 331, 334 (Tenn. 1983) (quoting Restatement of Contracts, section 235(d) and comment) (emphasis added).

In interpreting the Agreement at issue in this case, the reciprocal compensation rights and obligations of BellSouth and MCI must be governed by the law in existence when they entered into the Agreement. *See Winter v. Smith*, 914 S.W.2d 527 (Tenn. Ct. App. 1995); *see also Kee v. Shelter Ins.*, 852 S.W.2d 226 (Tenn. 1993) (laws affecting enforcement of a contract, and existing at time and place of its execution, enter into and form part of the contract). Here, BellSouth and MCI entered into the Agreement for the express purpose of fulfilling their respective obligations under the 1996 Act. (Part A, General Terms and Conditions, § 6)

C. THE STATUS OF THE LAW AT THE TIME THE AGREEMENT WAS EXECUTED

1. The Reciprocal Compensation Provisions of §251(b)(5)

As noted above, Section 251(b)(5) provides that local exchange carriers must “establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). In a rule that was promulgated in 1996 and that is not subject to attack here, the FCC has interpreted this provision to require the payment of reciprocal compensation exclusively for *local* telecommunications traffic. 47 C.F.R. § 51.703(a).

The parties negotiated the Agreement against the backdrop of such FCC rules. The 1996 Act provides that parties must negotiate “the particular terms and conditions of agreements to fulfill the duties described” in sections 251(b) and (c). 47 U.S.C. § 251(c)(1). Among those statutory duties is the reciprocal compensation obligation of section 251(b)(5). If the parties are unable to agree concerning the implementation of the reciprocal compensation obligation, the State commission may resolve their differences in accordance with “the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.” *Id.* § 252(c)(1). For this reason, parties have an incentive to agree to conform their obligations to the requirements of law (in this instance there is a contractual obligation to do so), for they have no right to demand anything more than what the law requires.

Not surprisingly, therefore, this Agreement reflects the parties' intentions to pay reciprocal compensation as required by federal law — that is, for *local* traffic only. The parties may perhaps have disagreed as to the *application* of federal law and their agreements to specific cases — for example, they may have had different internal understandings of whether federal law requires payment of reciprocal compensation for Internet-bound traffic. Or they may not have considered the issue of Internet-bound traffic at all. The crucial point for present purposes, however, is that the parties intended to implement the obligation imposed by federal law — a point that was not contested by MCI. Close examination of the language of the specific agreements makes that conclusion inescapable.

The language of the Agreement explicitly limits reciprocal compensation obligations to "Local Traffic." Furthermore, the Agreement defines "local traffic" in a way that precisely tracks the definition adopted by the FCC for the very purpose of defining reciprocal compensation obligations under the 1996 Act.

Section 51.701(b) of the FCC's rules provides:

For purposes of this subpart, local telecommunications traffic means:

(1) Telecommunications traffic between a LEC and a telecommunications carrier other than a [mobile phone service] provider that originates and terminates within a local service area established by the state commission.

47 C.F.R. § 51.701(b). This language itself tracks the first FCC statement concerning the minimum requirements imposed by section 251(b)(5):

The statutory provision . . . encompass[es] telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing LEC in the same local service area

Local Interconnection NPRM, 11 FCC Rcd at 14249, ¶ 230.

As noted above, the Agreement provides:

Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

The contract provision and the regulatory provision are substantively *identical*:

- Both define "local traffic" based on where it "originates" and "terminates";
- Both require that the traffic originate and terminate within the same local exchange (or extended area service exchange);
- Both define the local exchange by reference to state regulation — in one case by reference to the "local service area established by the state commission"; in the other by reference to BellSouth's state-approved tariff.

The Agreement was signed after the FCC issued its *Local Interconnection Order*; thus, the parties were fully aware of the specific terms of the governing federal regulations. Thus, in rendering its decision, the TRA must consider whether the Agreement was intended to conform the parties' obligations to those imposed under federal law (which it clearly was) and whether federal law requires the payment of reciprocal compensation for ISP traffic (which it does not).

2. The “Two-Call Theory” and the Definition of Local Call Termination

The only way ISP-bound traffic can be understood to be “*terminating local traffic*” is if it is divided into two parts: (1) a local call from the end-user that allegedly “*terminates*” at the ISP’s premises and (2) a separate call from the ISP to the Internet site or sites that the end-user wants to access. This is the “two-call theory” upon which MCI bases its entire argument that it is entitled to reciprocal compensation under the terms of the Agreement.

MCI’s theory, however, is directly contradicted by decades of established law. Over fifty years ago, a federal court explained: “That the Communications Act contemplates the regulation of interstate wire communication *from its inception to its completion* is confirmed by the language of the statute and by judicial decisions. *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944) (emphasis added), *aff’d sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945). That same principle has been reiterated by both the courts and the FCC many times in the intervening decades.

Indeed, as long ago as 1966, both the FCC and the D.C. Circuit rejected the argument that a so-called “channel service,” by which a cable television operator used an antenna to receive broadcast television signals and then delivered those signals to customers using local telephone lines, should be divided into its different, technologically distinct parts. *Order Requiring Common Carriers To File Tariffs With Commission for Local Distribution Channels Furnished for Use in CATV Systems*, 4 F.C.C.2d 257 (1966)). In language directly applicable here, the circuit court

explained that, despite the different characteristics of the separate parts of the service, the “stream of communication is essentially uninterrupted and properly indivisible.” *General Tel. Co. v. FCC*, 413 F.2d 390,401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

More recently, the FCC reached the same result in a similar case involving a “voice mail” telecommunications message system. There, the Georgia Public Service Commission had attempted to exercise jurisdiction on the theory that “when the voice mail service is accessed from out-of-state, *two* jurisdictional transactions take place: one from the caller to the telephone company switch that routes the call to the intended recipient’s location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate.” *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619, 1620, ¶ 8 (1992) (emphasis added). The FCC disagreed and preempted the state agency order. Because “there is a continuous, two-way transmission path from the caller location to the voice mail service,” there could be but a single call. *Id* ¶ 9. That Order too was affirmed. *See Georgia Pub. Serv. Comm’n v. FCC*, 5 F.3d 1499 (11th Cir. 1993) (table).

Similarly, when long-distance carriers began using 1-800 numbers (for credit-card calls and similar purposes), the FCC rejected arguments that two calls were created by the “second dial tone” heard when the long-distance carrier was reached. *Southwestern Bell Tel. Co. Transmittal Nos. 1537 and 1560 Revisions to Tariff FCC No. 68*, 3 FCC Rcd 2339, 2341, ¶¶ 24-28. (1988). The FCC held that,

"[s]witching at the credit card switch is an intermediate step in a *single end-to-end communication*." *Id.* ¶ 28 (emphasis added). "[T]he jurisdictional nature of a call is determined by its *ultimate* origination and termination, and not . . . its intermediate routing." *Id.* ¶ 26 (emphasis added). Many other cases are to the same effect.⁶ Indeed, if it *were* true that a separate part of an Internet communication terminated locally at the ISP, logically that would lead to the preposterous result that long-distance *voice* services over the Internet -- services indistinguishable from those provided by AT&T or MCI -- would also be local.

Given this enormous body of precedent, which predates the parties' Agreement, it is not surprising that the FCC squarely determined in two separate decisions that its reciprocal compensation rule did not apply to Internet-bound traffic. (See, *ISP Declaratory Ruling* and *Advanced Services Remand Order*) As discussed above, the FCC found that the statutory reciprocal compensation provision -- just like the Agreement at issue here -- applies only to traffic that "originates" and "terminates" in the same local calling area. First Report and Order,, 11 FCC Rcd at 16013, ¶ 1034. The FCC, applying the precedents

⁶ As the FCC explained in yet another ruling making this same point:

[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications . . . [A] single interstate communication.. . does not become two communications because it passes through intermediate switching facilities.

Long Distance/USA, Inc., 10 FCC Rcd 1634, 1637, ¶113 (1995); *accord Teleconnect Co.* 10 FCC Rcd 1626, 1629-30, ¶112 (1995)), *affd*, 116 F.3d 593 (D.C. Cir. 1997).

described above, determined that reciprocal compensation is not required for ISP-bound calls because those calls do not terminate at the ISP's local server.

The plain language of the Agreement should be read not only in the context of these decisions, but also with a healthy dose of common sense. The simple fact is that, if an end-user's call to the Internet actually "terminated" at the ISP's premises, it is impossible to explain how information is transmitted between the end-user and Internet sites all over the country and the world. The end-user can send and receive such information *only* because the ISP actually functions as an intermediary, sending the end-user's communication to Internet sites around the globe and then routing information back from the Internet site through the ISP's own facilities and on to the end-user. The receipt of that information is incomprehensible if one believes that the connection between the end-user and the ISP has terminated before the ISP connects to an Internet site.

Consistent with that determination, there is every reason to believe that the FCC will reiterate its understanding on this issue and provide further explanation, as required by the D.C. Circuit's *Bell Atlantic* decision vacating and remanding the *ISP Declaratory Ruling*. Importantly in this regard, and contrary to the district court's understanding, the D.C. Circuit's decision does not hold that the FCC's regulatory definition of "termination" necessarily includes calls routed through ISPs because ISPs are the "called party" under that regulation. Indeed, that understanding of *Bell Atlantic* makes no sense in light of the D.C. Circuit's disposition of the case. Since the FCC's rules *require* reciprocal compensation for all traffic that terminates locally

(see 47 C.F.R. § 51.701(b)(1)), if the district court were correct, there would have been no need for an open-ended remand for further explanation. In any event, as noted above, the FCC is now conducting proceedings to explain more fully its view that Internet-bound traffic does not terminate locally.

Accordingly, to conclude that ISP-bound traffic is "*terminating local* traffic" that "originates" and "terminates" in the same calling area, one would have to disregard these real world facts, established case law, and the FCC's own authoritative interpretation of language that is *substantively identical* to that contained in the Agreement. The TRA should reject such a spurious proposition.

C. THE PARTIES DID NOT MUTUALLY AGREE TO PAY RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC.

Nothing in the Agreement even remotely suggests that MCI and BellSouth mutually intended to pay reciprocal compensation for ISP-bound traffic. In fact, the issue of whether reciprocal compensation would be paid for ISP traffic under the terms of the Agreement was never discussed. (Martinez, Direct at 5) *See, e.g., Johnson v. Central National Ins. Co.*, 210 Tenn. 24, 356 S.W.2d 277, 281 (1962) (to be enforceable, contract "must, among other elements, result from a meeting of the minds in mutual assent to terms..."); *Jamestowne on Signal, Inc. v. First Federal Sav. & Loan Ass'n*, 807 S.W.2d 559, 564 (Tenn. Ct. App. 1990). Thus, MCI has failed to satisfy the burden of proof necessary to sustain its interpretation of the Agreement.

D. THE AUTHORITY'S DECISION IN *BROOKS FIBER* AND THE DECISIONS OF OTHER STATE COMMISSIONS RELIED UPON BY MCI ARE NEITHER CONTROLLING NOR PERSUASIVE.

MCI urges the TRA simply to follow its decision in *In re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118 (August 17, 1998) ("*Brooks Fiber*"). BellSouth submits that it would be serious error for the TRA to do so. In *Brooks Fiber*, the TRA found that ISP-bound calls constituted local traffic under the interconnection agreement at issue, relying upon the understanding that ISP-traffic involves two separate communications. See Initial Order, Docket No. 98-00118, at 18 (April 21, 1998) (finding that the information service provided by an ISP "... after the telecommunications service, as defined by the FCC, has terminated at the ISP ... is of no import in the analysis"). The TRA's two-call reasoning is flatly wrong, however, as the FCC made abundantly clear in its *Declaratory Ruling and Advanced Services Remand Order*. Whereas the TRA determined that ISP-traffic involves two separate calls (one of which is a local call that "terminates" at the ISP's premises), the FCC concluded that ISP-traffic involves a single call from the end-user that does not terminate at the ISP's premises but continues through the ISP and all the way on to the website that the end-user seeks to access. The FCC's holding leaves no room for continued adherence to the TRA's decision in *Brooks Fiber*. Ironically enough, MCI basis its entire argument on this same "two-call theory". The TRA should not perpetuate the error of the *Brooks Fiber* decision as MCI suggests.

MCI also places considerable emphasis on numerous state commission decisions addressing the issue of reciprocal compensation for ISP-bound traffic. Contrary to MCI's request, the TRA should decide this matter based on the unique facts and evidence adduced in this proceeding, rather than blindly following other state commission decisions based on facts and circumstances not present here.

For example, the vast majority of the state commission decisions in BellSouth's region concerning ISP-bound traffic -- Florida, Georgia, North Carolina, and Tennessee --were rendered prior to the FCC's *Declaratory Ruling*. Those decisions were generally based exclusively on the two-call theory since repudiated by the FCC. One such case (North Carolina) has already been remanded by a federal district court to the state commission for reconsideration in light of the FCC's *Declaratory Ruling*.

Likewise, the Louisiana Public Service Commission recently recognized as much in dismissing a complaint brought by KMC against BellSouth seeking the payment of reciprocal compensation for ISP-bound traffic. Order No. U-23839, *KMC Telecom, Inc. v. BellSouth Telecommunications, Inc.*, Docket No. U-23839 (Oct. 28, 1999) (copy attached). The Louisiana Commission found that the terms of the KMC agreement did not obligate the parties to pay reciprocal compensation for ISP-bound traffic and concluded that "KMC failed to meet its burden of producing sufficient extrinsic evidence to establish that the parties mutually intended to pay reciprocal compensation for non-local, ISP traffic." Likewise, MCI has failed to meet its burden of proof in this proceeding.

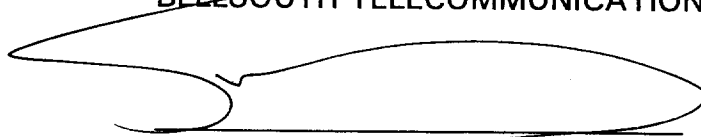
The above examples demonstrate that each individual case must be decided based upon its own particular set of facts. No other state commission was faced with the same set of facts adduced in this proceeding concerning the respective intent of BellSouth and MCI under this Agreement. These facts conclusively demonstrate that MCI and BellSouth did not mutually agree to pay reciprocal compensation for ISP-bound traffic and that the clear language of the Agreement does not contemplate the payment of reciprocal compensation for ISP traffic.

VI. CONCLUSION

For the foregoing reasons, the TRA should find in favor of BellSouth and dismiss MCI's complaint.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line.

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1 LOUISIANA PUBLIC SERVICE COMMISSION

2
3 ORDER NO. U-238394
5 KMC TELECOM, INC.

6 V.

7 BELLSOUTH TELECOMMUNICATIONS, INC.
8
910
11 *Docket No. U-23839 - In Re: Petition of KMC Telecom, Inc. against BST to enforce reciprocal*
12 *compensation provisions of the Parties' Interconnection Agreement.*
1314 *(Decided at Open Session held October 13, 1999)*
1516 *Nature of the Case*
1718 KMC Telecom, Inc. ("KMC") and BellSouth Telecommunications, Inc. ("BST") entered into
19 an Interconnection Agreement (the "Agreement") on February 24, 1996 which was deemed approved
20 by the Commission on June 20, 1997. That Agreement calls for the payment of reciprocal
21 compensation for local calls¹ that originate on one company's network which are transported to and
22 terminate on the other company's network. The reciprocal compensation rate is set out in the
23 Agreement and is not at issue in this matter. What is at issue, however, is whether or not reciprocal
24 compensation is owed for a particular type of call. KMC asserts that the parties must pay each other
25 reciprocal compensation for calls that originate on one party's network that are directed to Internet
26 service providers ("ISPs") which are located on the other party's network ("ISP traffic"). BST
27 contests KMC's assertion, arguing, inter alia, that ISP traffic does not terminate locally on either
28 party's network and that ISP traffic is interstate, switched exchange access traffic rather than local,
29 and hence no reciprocal compensation is due for these calls.
3031 *Jurisdiction*
3233 Jurisdiction for the Louisiana Public Service Commission is provided for in the Louisiana
34 Constitution, Article IV, Section 21, which states:35 The commission shall regulate all common carriers and public utilities and have such
36 other regulatory authority as provided by law. It shall adopt and enforce reasonable
37 rules, regulations, and procedures necessary for the discharge of its duties, and shall
38 have other powers and perform other duties as provided by law.

1Local calls, as defined by §1.41 of the KMC/BST Interconnection Agreement.

1 The Commission has the authority to regulate the service of telephone utilities; its power is
2 sufficiently broad to include adjustment of telephone service to customer needs. South Central Bell
3 Tel. Co. v. Louisiana Public Service Commission, Supp. 1977, 352 So.2d 999. Further, the FCC,
4 in its *Declaratory Ruling*² specifically stated, at ¶24, state commissions have the authority to
5 construe "the parties' agreements to determine whether the parties so agreed" to pay reciprocal
6 compensation for ISP-bound traffic.

7 Additionally, the KMC/BST Interconnection Agreement provides:

8 36.8 Resolution of Disputes: Except as otherwise stated in this Agreement, the Parties
9 agree that if any dispute arises as to the interpretation of the Agreement or as to the
10 proper implementation of this Agreement, the Parties will petition the Commission or
11 the FCC for a resolution of the dispute. However, each Party reserves any right it
12 may have to seek judicial review of any ruling made by the Commission or the FCC
13 concerning this Agreement.

14
15 36.9 Governing Law: This Agreement is subject to the Act, and the effective rules and
16 regulations promulgated pursuant to the Act, and any other applicable federal law, as
17 well as the rules of the Commission, and shall be further governed by and construed
18 in accordance with the domestic law of the state of performance without regard to its
19 conflicts of law principles.
20
21

22 *Procedural History*

23
24 KMC Telecom, Inc. ("KMC") filed this proceeding on January 5, 1999 to require BellSouth
25 Telecommunications, Inc. ("BST") to pay reciprocal compensation under the KMC/BST
26 Interconnection Agreement (the "Agreement"). The complaint was published in the Commission's
27 Official Bulletin on January 22, 1999. On February 1, 1999 AT&T Communications of the South
28 Central States, Inc. ("AT&T"), E.spire Communications, Inc. ("E.spire"), and ITC^DeltaCom
29 Communications, Inc. ("ITC^DeltaCom") all filed separate pleadings to intervene in this proceeding.
30 Cox Louisiana Telcom II, L.L.C. ("Cox") filed a petition for intervention on February 2, 1999 and
31 then on February 3, 1999 filed a Motion for Leave to File out of Time Intervention. BST's answer
32 was received into the docket on March 1, 1999. BST filed a Motion to Strike Interventions or
33 Alternatively to Limit Participation of Intervenors on March 3, 1999. ITC^DeltaCom and E.spire
34 filed their oppositions to BST's motion on March 10, 1999. AT&T and Cox filed oppositions to
35 BST's motion on March 15, 1999. A ruling was issued on April 12, 1999 which allowed partial

²Declaratory Ruling in CC Docket Number 96-98 and Notice of Proposed Rulemaking in CC Docket
Number 99-68

1 participation by intervenors, including participation during potentially dispositive portions of the
2 proceeding. Cox withdrew its request for intervention on April 12, 1999.

3 ITC^DeltaCom filed a Motion for Summary Judgment on March 17, 1999; KMC also filed
4 a Motion for Summary Judgment on March 18, 1999. After the parties briefed the summary motions,
5 oral argument was heard April 12, 1999. The Administrative Law Judge issued a Ruling denying the
6 motions for summary judgment on May 24, 1999.

7 Testimony was filed by the parties and the hearing was held on May 26, 1999. Posthearing
8 briefs were filed on August 8, 1999 by KMC, E.spire, BST, and Staff. Posthearing reply briefs were
9 filed by KMC, E.spire, BST, Staff, and AT&T. Further, Leave to File Amicus Briefs was filed by
10 Southeastern Competitive Carriers Association ("SECCA"), Cox, and Advance Tel, Inc. ("EATEL").
11 Cox had previously intervened in this proceeding, but withdrew its intervention upon the issuance of
12 the Ruling on the Motion to Strike Interventions. SECCA also filed a Motion to Intervene with its
13 Amicus Brief. BST filed a Response to the Motions for Leave to File Amicus Briefs and Opposition
14 to SECCA's Motion for Leave to File Out of Time Interventions on August 25, 1999. Leave to file
15 Amicus Briefs was granted on August 30, 1999. The new participants, SECCA, Cox, and EATEL
16 wished to file responses for the limited purpose of replying to Staff's alleged expansion of the
17 proceeding, and their briefs were accepted into the docket.

18 A proposed recommendation was issued by the Administrative Law Judge on September 10,
19 1999. Exceptions to the Proposed Recommendation were filed by Staff and BST on September 24,
20 1999. Replies to BST's and Staff's Exceptions were filed by KMC, E.spire, and SECCA on October
21 1, 1999. Cox filed a Reply to Exceptions on October 7, 1999.

22
23 ***Summary of Parties Contentions***

24
25 ***KMC's Position***

26
27 In this proceeding, KMC seeks to require BST to pay reciprocal compensation to KMC for
28 calls that originate on BST's network which are directed to ISPs on KMC's network. KMC asserts
29 that payment of reciprocal compensation for ISP-bound traffic is due under the KMC-BST
30 Interconnection Agreement (hereinafter referred to as the "Agreement"), while BST argues that the
31 Agreement does not require reciprocal compensation for this type of traffic.

1 KMC first asserts that ISP-bound calls have historically been treated by the FCC as local calls,
2 thereby making the calls eligible for reciprocal compensation. KMC uses the 1996
3 Telecommunications Act (the "Act") and subsequent FCC orders to interpret the reciprocal
4 compensation provisions of the Agreement. KMC especially points to the portions of the FCC's
5 Declaratory Ruling in CC Docket Number 96-98 and Notice of Proposed Rulemaking in CC Docket
6 Number 99-68 (the "*Declaratory Ruling*") wherein the FCC noted ISP traffic historically had been
7 treated as local traffic and allowed state commissions to continue to interpret interconnection
8 agreements. KMC urges that the *Declaratory Ruling* (at ¶23) states that the FCC has treated ISP-
9 bound traffic as though it were local, and the FCC's statement that the traffic is jurisdictionally mixed
10 does not affect the regulatory treatment state commissions may give the traffic. KMC argues that the
11 FCC has, since at least 1983, exempted ISPs from paying interstate access charges. Further, KMC
12 asserts that ISPs pay local rates and ILECs [incumbent local exchange carrier] treat expenses and
13 revenues related to ISPs as local expenses and revenues. KMC also points to the language of ¶25
14 of the *Declaratory Ruling*, which states that the FCC's "policy of treating ISP-bound traffic as local
15 for the purposes of interstate access charges would, if applied in the separate context of reciprocal
16 compensation, suggest that such compensation is due for that traffic." KMC argues that this passage
17 demonstrates that BST must pay reciprocal compensation for calls from BST customers to ISPs on
18 KMC's network. Finally, KMC points to the multiple factors the FCC set out for state commissions'
19 consideration for analyzing interconnection agreements (found in ¶24 of the *Declaratory Ruling*) for
20 the Commission's consideration.

21 KMC further argues that the provisions of the Agreement clearly and unambiguously call for
22 reciprocal compensation. KMC asserts that the agreement provides for two types of traffic only:
23 local and toll. KMC further argues that ISP-bound traffic must fall into one of these two types of
24 traffic, and that type must be local traffic. In support of this contention, KMC points to the
25 Agreement's definition of local traffic (§1.41³) and argues that if BST wanted to exclude ISP-bound

³1.41: "Local Traffic" refers to calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g. Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

1 traffic from this definition, it would have done so. Further, KMC asserts that the industry treats this
2 type of traffic as local, therefore the common understanding was that the definition of "local traffic"
3 would include ISP-bound traffic.

4 KMC also argues that ISP-bound traffic terminates on KMC's network, at the ISP server.
5 KMC points to the definition of "termination" found in In re: Implementation of the Local
6 Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report
7 and Order, August 8, 1996, ¶1040, which states that termination is "the switching of local
8 telecommunications traffic at the terminating carrier's end office switch, and delivery of such traffic
9 to the called party's premises." Thus, KMC argues, under the FCC definition, the call terminates at
10 the ISP. Further supporting its contention that BST itself treats calls as terminating at the ISP server,
11 KMC points to the 1997 Memorandum from Mr. Bush at BST to all CLECs [competitive local
12 exchange carrier] to inform CLECs that BST would not be paying ISP traffic reciprocal
13 compensation, BST refers to traffic terminating at the ISP server. KMC asserts that if there truly was
14 a need to send this Memorandum to clarify BST's position on the ISP traffic reciprocal compensation
15 issue, then there was some expectation that ISP-bound traffic would receive compensation.

16 KMC contends that the obligation of BST to pay reciprocal compensation on ISP-bound
17 traffic is found in the Agreement. However, KMC asserts that extrinsic evidence additionally shows
18 that reciprocal compensation is owed so that BST's argument that compensating for ISP-bound
19 traffic would cost BST too much is unavailing. KMC also argues that courts cannot amend or annul
20 a contract to avoid some alleged hardship to a party. KMC replies to BST's argument that there was
21 no meeting of the minds regarding reciprocal compensation by urging that BST is misconstruing
22 Louisiana contract interpretation law. KMC asserts that whether or not there was a meeting of the
23 minds goes to whether or not a contract was formed, relating to offer and acceptance. In this
24 proceeding, KMC urges, the dispute is not if a contract was formed but what the contract says—
25 contract interpretation. KMC, citing C.C. Art. 2054, argues that if the contract is silent on a point,
26 then the parties to the contract are bound to what law, equity, and usage determine should be the
27 outcome.

28 KMC further states that if BST is not obligated to pay reciprocal compensation, absurd
29 consequences will result in that BST would not have to pay for services rendered to it by KMC.

1 KMC asserts that even if the Commission believes there was no meeting of the minds regarding the
2 payment of reciprocal compensation, the doctrine of unjust enrichment calls for BST to pay for the
3 services rendered.

4
5 ***BST's Position***

6 BST asserts that the only issue before the Commission is whether or not BST and KMC
7 shared a common intent to pay reciprocal compensation for ISP-bound traffic under the Agreement.
8 BST contends that the parties did not so intend, and that it should not be obligated to do so now.

9 BST first frames its argument in terms of what is required of ILECs under the
10 Telecommunications Act of 1996. BST cites the portions of the Act, 47 USC 252 (d)(2), which
11 provide for reciprocal compensation for local traffic. BST contends that calls to ISPs do not
12 constitute local traffic, nor terminate at the ISP server, therefore there is no reciprocal compensation
13 obligation for this traffic owed to KMC.

14 BST argues that because the FCC stated in the *Declaratory Ruling* that ISP-bound traffic is
15 largely interstate, that traffic is not subject to reciprocal compensation. Further, BST asserts, ISP
16 traffic is subject to the FCC's regulation governing the transport and termination of interstate or
17 intrastate interexchange traffic. Therefore, to be subject to federal regulation, the traffic cannot be
18 completely local.

19 BST also cites portions of the *Declaratory Ruling* wherein the FCC discusses the nature of
20 the call from an end user to an ISP. BST asserts that in ¶12-13, the FCC states that the nature of the
21 call is analyzed by looking at the end-to-end communication, and the call is not broken down into
22 pieces. Therefore, the ends of ISP-bound traffic are the end user and the remote Internet site--not
23 the ISP server, as the call goes through the server to the Internet site. Using this argument, BST
24 asserts that ISP-bound calls do not terminate at the ISP server, but actually terminates at the Internet
25 site accessed, wherever that site may be. Following this argument, BST contends that ISP-bound
26 traffic is interstate, not local, and thus not subject to the reciprocal compensation obligation of the
27 KMC Agreement.

28 BST states that ISPs use the LEC's local network to institute calls by and to ISP end user
29 customers. BST asserts that the FCC has stated that the portion of the call that is from the LEC to

1 the ISP is interstate in nature. Typically, there is an interstate access charge assessed by ILECs to
2 LECs for interstate calls. However, the FCC exempted ESP calls from the access charge in the early
3 1980's to promote the growth of the ESP industry. BST asserts that though the exemption results
4 in the treatment of certain aspects of ISP-bound traffic as local, the fact that the FCC had to exempt
5 it shows that the traffic is not truly local.

6 BST states that the Act does not require reciprocal compensation when a call originates on
7 one LEC's network and terminates on a remote Internet site. However, the FCC stated there are
8 circumstances where state commissions may find reciprocal compensation is owed: 1) Where parties
9 have agreed to reciprocal compensation and 2) Where the state commission arbitrates the agreement.
10 In this instance, the Commission did not arbitrate the Agreement; rather, KMC and BST came to an
11 Agreement. BST asserts that the Agreement does not provide for reciprocal compensation for ISP-
12 bound traffic.

13 BST argues that ISP traffic has always been interstate in nature, and if there is any doubt
14 regarding this designation, the law at the time of entering the Agreement controls. BST asserts that
15 the legal understanding at the time the contract was entered into was that the FCC treated ISP-bound
16 traffic as non-local for some purposes. Further, BST asserts that KMC bears the burden of proving
17 the existence of an obligation under the Agreement. To do so, argues BST, KMC must prove that
18 ISP-bound calls are transported by KMC, are terminated on KMC's network, and are local.

19 BST cites many provisions of the Louisiana Civil Code regarding contract interpretation,
20 using these rules to argue KMC did not carry its burden of proving that parties shares a common
21 intent to pay reciprocal compensation for non-local ISP-bound traffic. Further, BST asserts KMC
22 did not provide any compelling extrinsic evidence regarding intent, as KMC Witness Ms.
23 Breckenridge stated that KMC did not negotiate the contract but merely opted into a contract that
24 was negotiated by some other company. BST also cites the testimony of Ms. Breckenridge to show
25 that KMC did not specifically consider reciprocal compensation at the time KMC opted into the
26 Agreement.

27 BST argues that KMC's complaint stems solely from the mistaken belief that calls from the
28 end user to the ISP are local and terminate at the ISP server. Further, BST argues that KMC
29 mistakenly believes that reciprocal compensation is required under the Act. BST asserts KMC's

1 witness Breckenridge could not point to any FCC language that stated ISP-bound calls terminate at
2 the ISP server for purposes of reciprocal compensation.

3 BST urges that KMC must take the Agreement that it opted into as KMC finds it. Further,
4 BST asserts that under Louisiana contract law, the contract must be interpreted against the obligee
5 (KMC) and in favor of the obligor (BST) when a dispute arises. Additionally, BST addressed the
6 application of the FCC factors regarding interpretation of the Agreement. To this point, BST argued
7 that the factors set forth are only illustrative. Furthermore, BST asserts that many of the factors
8 suggested by the FCC already have FCC rules regarding the factors, calling for LECs to treat the ISP-
9 calls in certain ways. Therefore, BST argues, these factors cannot be used to prove intent of BST.

10 BST argues that the other state commissions' decisions that KMC cited are not dispositive
11 of this matter. BST asserts that many of the decisions were issued prior to the *Declaratory Ruling*
12 and thus are based on a two-call analysis regarding ISP-bound traffic. The *Declaratory Ruling*,
13 argues BST, did not accept the two-call analysis and any decision based on that analysis must be
14 reconsidered. Additionally, BST argues that some of the cases cited by KMC were arbitrations,
15 and/or the interconnection agreements at issue were not quite the same as the Agreement in this
16 proceeding. Finally, BST argues that those other cases cited by KMC dealt with factual
17 circumstances very different from the facts of this particular case.

18 BST asserts that their witness, Mr. Hendrix, established that at the time of the contract, BST
19 understood ISP-bound traffic was not local. Further, BST did not then and does not now believe the
20 Act mandates reciprocal compensation. BST argues that the definition of "local traffic" in the
21 Agreement does not implicitly include ISP-bound traffic, therefore there was no need to exclude such
22 traffic. Additionally, the ISP-bound traffic does not terminate at the ISP server, argues BST,
23 asserting technical words must be given technical meanings, contrary to KMC's statement. BST also
24 argues that it has never knowingly paid reciprocal compensation for ISP traffic. In support, BST
25 claims that it began holding all reciprocal compensation billings in October of 1995 and identified a
26 process at least as early as January of 1997 to ensure that it did not bill reciprocal compensation on
27 ISP traffic. BellSouth implemented this process in September of 1997 and wrote off most all prior
28 traffic that it had held.

1 Finally, BST argues that if it was obligated to pay reciprocal compensation on ISP-bound
2 traffic, that result would be absurd as KMC would then make 338% more revenue from reciprocal
3 compensation than it does from providing service to its 10 ISP customers.
4 Further, BST asserts that Sections 1.59 and 1.6 of the Agreement are relevant provisions which
5 demonstrate that the parties intended to pay reciprocal compensation only on that traffic which is
6 within the scope of the 1996 Act.⁴ BST also argues that ISPs provide Switched Exchange Access
7 Service, therefore such traffic is excluded from reciprocal compensation under Section 1.41 of the
8 Agreement.

9 BST argues that there is no evidence that KMC is providing a service to BST for which KMC
10 is not being compensated and that KMC is compensated for any such costs in the same manner as
11 BellSouth, from the revenues that it receives from its ISP customers.

12 13 *Staff's Position*

14 Staff asserts that the FCC has determined that calls to ISPs are to be analyzed as one call, that
15 is, the call that goes from the customer to the ISP to the ultimate Internet site is considered one call.
16 Per this rationale, Staff states that ISP-bound traffic is not subject to state enforcement just because
17 the call is local, for the call is not entirely such. Staff further asserts that the FCC, in the *Declaratory*
18 *Ruling*, says that state commissions have the power to interpret interconnection agreements, which
19 may bind parties to pay reciprocal compensation for ISP-bound traffic. Thus, Staff contends, the
20 Commission must interpret the Agreement.

21 Staff maintains that the factors set forth by the FCC in the *Declaratory Ruling* for determining
22 whether or not parties intended to pay reciprocal compensation for calls to ISPs are illustrative only,
23 and the state commissions are the ultimate arbiters of what factors are relevant to interpreting parties'
24 intentions. Staff states that in examining the intent of KMC and BST, it is not within the province
25 of the court to make new contracts for the parties, and the court is confined to only interpreting the
26 agreement between the parties. Staff concludes that given the evidence presented at the hearing,

⁴1.59: "Reciprocal Compensation" is as described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of the Telecommunications traffic originating on one Party's network and terminating on the other Party's network.

1.6: "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

1 KMC and BST had different intentions when entering into the Agreement. Therefore, Staff urges,
2 there was no meeting of the minds, or alike understanding, which is necessary for a valid contract.
3 Ultimately, Staff argues, reciprocal compensation is not owed under the Agreement because KMC
4 and BST did not share an understanding of the treatment of ISP-bound traffic.

5 Staff further asserts that KMC bears the burden of proof in this proceeding and must prove
6 that the parties intended for reciprocal compensation to be owed for ISP-bound traffic. Staff argues
7 that KMC has not carried its burden of proof and KMC put on an insufficient amount of direct or
8 extrinsic evidence to support its claim that the parties mutually agreed to pay reciprocal
9 compensation. Furthermore, Staff states, there were no negotiations in the reaching of the
10 Agreement, as KMC only opted into an existing Interconnection Agreement. Staff points to the
11 testimony of KMC's witness, Ms. Breckenridge, wherein she testified that KMC did not specifically
12 consider reciprocal compensation. Staff asserts that her testimony proves there was no meeting of
13 the minds regarding the issue of reciprocal compensation for calls to ISPs.

14 Staff also took a stance on policy issues surrounding reciprocal compensation. Staff asserts
15 that the Commission's duty is to promote efficient entry by new providers into the local exchange
16 market. Staff maintains that the unqualified payment of reciprocal compensation does not promote
17 real competition. Staff argues that to follow KMC's prayed for result, all that would result would
18 be cost shifting, taking money from one source and shifting it to another, which does not bring about
19 a true increase in competition. Finally, staff urged that reciprocal compensation is not owed by BST
20 to KMC for ISP-bound traffic.

21 Staff filed two brief exceptions to the Proposed Recommendation. Staff, like BST, asserts
22 that KMC properly has the burden of proof at hearing because KMC is demanding performance of
23 the contract. Staff, also like BST, asserts that it objects to the classification of the Agreement as a
24 standard form because no party raised such issue at hearing. Further, Staff urges that KMC came to
25 the negotiating table with BST with the Agreement, therefore if the Agreement is standard form, it
26 is KMC's standard form.

27
28 ***Intervenors' Positions***

29 Intervenors, E.spire, Cox, EATEL, AT&T and SECCA, through their individual filings

1 adopted the positions and arguments expressed by KMC. Intervenor also urged the Commission
2 to expressly limit its decision in this proceeding to the dispute regarding the KMC/BST
3 Interconnection Agreement.

4
5 **Factual Findings**

- 6
7 1. KMC and BST both provide local exchange services in Louisiana. BST is the incumbent local
8 service provider. KMC has two switches within Louisiana, a Shreveport switch which
9 became operational in November, 1997, and a Baton Rouge switch which became operational
10 in December of 1997. (Tr. Breckenridge at 19, 57)
- 11
12 2. Under Section 901.D of the Louisiana Public Service Commission's Competition Regulations,
13 local exchange carriers are required to interconnect their networks, to transport and terminate
14 local traffic exchanged on those networks, and to make arrangements for mutual
15 compensation for providing transport and termination services.
- 16
17 3. KMC and BST signed an interconnection agreement February 24, 1997 ("Agreement"). The
18 Agreement is a regional agreement between KMC and BST in Alabama, Florida, Georgia,
19 Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. (Agreement
20 at 1)
- 21
22 4. In accordance with provisions of Section 252(i) of the Telecommunications Act of 1996,
23 KMC opted into an existing agreement between Metropolitan Fiber Systems and BST.
24 Therefore, the parties did not negotiate the terms of the Agreement in the traditional sense;
25 there were no meetings to hammer out terms of the Agreement between KMC and BST. (Tr.
26 Breckenridge at 27)
- 27
28 5. The Agreement was submitted to the LPSC for review, and approved by the Commission in
29 Order Number U-22404, issued June 20, 1997, pursuant to USC 252(e). No other
30 determination was made with regard to the provisions contained in either 47 USC 251 or 47
31 USC 271.
- 32
33 6. A series of amendments to the Agreement have been filed. In each instance the Commission
34 did not specifically approve the Agreement; rather, the Commission published the application,
35 allowed the 90 days to elapse, and with no interventions having been received, the agreement
36 was "deemed" approved pursuant to 47 USC 252(1). Dates of Commission letters
37 responding to amendment requests are April 3, 1998; April 17, 1998; July 20, 1998; October
38 19, 1998; November 5, 1998; January 12, 1999; May 17, 1999.
- 39
40 7. Section 5.8 of the Agreement sets forth the following terms regarding the obligation of the
41 parties to pay reciprocal compensation:
- 42
43 5.8.1 Reciprocal Compensation applies for transport and termination of local traffic
44 (including EAS and EAS-like traffic) billable by BST or KMC when a Telephone
45 Exchange Service Customer originates on BST's or KMC's network for termination
46 on the other Party's network.
- 47
48 5.8.2 The parties shall compensate each other for transport and termination of Local traffic
49 (local call termination) at a single identical, reciprocal and equal rate as set forth in
50 Exhibit 8. [The rate is \$0.009 per minute.]
- 51
52 5.8.3 The Reciprocal Compensation arrangements set forth in this Agreement are not
53 applicable to Switched Exchange Access Service. All Switched Exchange Access

Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

8. The Agreement provides the following definitions of certain key terms:

Section 1.59: "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications traffic originating one Party's network and terminating on the other Party's network.

Section 1.6: "As Described in the Act" means as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission.

Section 1.41: "Local Traffic" refers to calls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g., Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Section 1.70: "Telephone Exchange Service" is As Defined in the Act.

Section 1.63: "Switched Exchange Access Service" means the following types of Exchange Access Services: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services.

9. Tricia Breckenridge was the only person at KMC involved in the negotiation of the Agreement with BST. Tricia Breckenridge decided to opt into an agreement previously entered between BST and Metropolitan Fiber Systems, rather than negotiate the terms of an agreement with BellSouth. Ms. Breckenridge did not read the Agreement prior to deciding to opt into it. Further, Ms. Breckenridge was not specifically considering the issue of reciprocal compensation when she decided to opt into the Agreement. Ms. Breckenridge testified that at the time the Agreement was executed, KMC understood that ISP traffic was treated as local and was included in the Agreement's reciprocal compensation obligations. Post-Hearing Brief at 15, Tr., Breckenridge at 14-16, Prefiled Direct at 7. Ms. Breckenridge was unable, however, to point to any specific language in any rulings or orders that supported her understanding, except when prompted by her counsel.
10. Mr. Jerry Hendrix, the person who executed the Agreement on behalf of BST, testified that BST understood that ISP traffic, like all ESP traffic, is non-local interstate traffic, specifically exchange access traffic. Mr. Hendrix testified that, as such, BST understood that ISP traffic was not subject to the reciprocal compensation obligation contained in Section 252(b)(5) of the 1996 Act. Mr. Hendrix further testified that the Agreement expressly provides that the reciprocal compensation obligation covers only the traffic that is subject to this statutory mandate. Further, Mr. Hendrix testified that the Agreement expressly excludes switched exchange access services from the reciprocal compensation obligation and that the FCC has recognized since the early 1980's that enhanced service providers, of which ISPs are a subset, provide exchange access services. Therefore, the Agreement expressly excludes ISP traffic from the reciprocal compensation obligation contained therein.
11. KMC has billed BST a total of \$2,326,464 in reciprocal compensation under the KMC Agreement. Of this amount, BST has paid KMC a total of \$165,479 for local, non-ISP, traffic, leaving an outstanding balance of \$2,160,985. Cochran Rebuttal at 5.

12. KMC has a total of ten ISP customers being served by its two switches in Louisiana. The amount of reciprocal compensation generated by the traffic flowing to those ten ISP customers approximates the \$2,160,985 outstanding reciprocal compensation balance that KMC claims to be owed by BST.
13. KMC generated approximately \$636,427 in revenue from providing service to its ten Louisiana ISP customers during the same time period that it billed BST \$2,160,985 in reciprocal compensation for traffic to those ten ISP customers.
14. BST began holding all reciprocal compensation billings to CLECs in October of 1995. At least as early as January of 1997, BST identified a process to ensure that ISP traffic would not be included in its reciprocal compensation billings to CLECs. BST implemented this process in September of 1997 and wrote off most all prior reciprocal compensation billings.
15. BST never knowingly billed or paid reciprocal compensation on any non-local traffic, including ISP traffic.
16. ISP traffic does not terminate locally at an ISP server, but rather transits through the ISP server for termination at a distant website, somewhere outside of the local calling area. ISP traffic is, therefore, interstate exchange access traffic that is not subject to the reciprocal compensation obligation contained in Section 252(b)(5) of the Telecommunications Act of 1996.
17. FCC regulations require that ISP traffic be exempted from the access charge regime. Pursuant to this exemption, ISPs are treated as end users for purposes of assessing access charges, and the FCC permits ISPs to purchase their links to the public switched telephone network through intrastate business tariffs rather than through interstate access tariffs. Thus, ISPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. In addition, incumbent LECs are required to treat expenses and revenue associated with ISP traffic as intrastate for separations purposes.
18. There is no prevailing industry custom of treating ISP traffic as "local" for reciprocal compensation purposes. FCC regulations require that ISPs be treated as end users for only one purpose, the access charge exemption.
19. KMC failed to produce any evidence to support its claim that if it does not receive reciprocal compensation for transporting ISP traffic originating on BellSouth's network, that it will incur otherwise uncompensated costs.
20. ISPs are a subset of Enhanced Service Providers ("ESPs") that utilize interstate switched exchange access services to connect to local exchange company central offices.

FCC's Declaratory Ruling

On February 26, 1999, in Common Carrier Docket Number 99-68, the FCC declared that the 1996 Act, 47 U.S.C. sec. 251(b)(5), mandated reciprocal compensation for the transport and termination of *local* traffic *only*. The FCC further held that this mandate does not extend to ISP-bound traffic, because ISP-bound traffic is not local but is interstate for purposes of the 1996 Act's reciprocal compensation provisions. ISP-bound traffic is not subject to state enforcement under the

1 1996 Act on the grounds that it is local traffic. See Declaratory Ruling at ¶ 12 and 26 n.87. The FCC
2 ruling effectively undermined the jurisdictional claim of state utility regulators over ISP-bound traffic.

3 In ruling in favor of federal versus state regulatory jurisdiction over ISP-bound traffic and in
4 construing 47 U.S.C. sec. 251(b)(5), the FCC focused on the "end-to-end" nature of the Internet
5 communication. The initiating caller or customer is one "end" of the communication, and the
6 terminating "end" is the web or other Internet site called by the customer. The FCC rejected
7 arguments that would segment such traffic into intra- and inter-state portions and thereby also
8 rejected a consequent, artificial segmentation of jurisdiction. Id. at ¶ 11. The FCC noted that it
9 "analyzes the totality of the communication when determining the jurisdictional nature of a
10 communication . . . [and] recognizes the inseparability, for purposes of jurisdictional analysis, of the
11 information service and the underlying telecommunications." Id. at ¶ 13. The FCC considers each
12 such commercial transaction as "one call" "from its inception to its completion" and accordingly
13 rejected the jurisdictional limitation implied by arbitrarily isolating the initial part of the call from the
14 rest of the stream of interstate commerce. Id. at ¶ 11.

15 In its ruling, however, the FCC did not in itself determine whether reciprocal compensation
16 is due in any particular instance. Rather, the FCC held that parties should be bound by their existing
17 interconnection agreements, as interpreted by state commissions. It found no reason to interfere with
18 state commission findings as to whether reciprocal compensation provisions of interconnection
19 agreements apply to ISP-bound traffic, pending adoption of a federal rule establishing an appropriate
20 interstate compensation mechanism.

21 *Analysis*

22 The central issue presented by KMC's complaint is whether KMC and BST shared a common
23 intent (mutually agreed) to pay reciprocal compensation for traffic that originates on the network of
24 one of the parties and is transported to an ISP customer served by the network of the other party (ISP
25 traffic), even though neither the Telecommunications Act of 1996 or any other law or regulation
26 requires the parties to pay reciprocal compensation for ISP-bound traffic. For the reasons stated
27 below, the Louisiana Public Service Commission ("LPSC" or "Commission") finds that KMC and
28 BST do not owe reciprocal compensation for ISP traffic under the terms of their Agreement.
29

1 Article 2045 of the Louisiana Civil Code provides that the "[i]nterpretation of a contract is the
2 determination of the common intent of the parties." "When the words of a contract are clear and
3 explicit and lead to no absurd consequences, no further interpretation may be made in search of the
4 parties' intent." La. Civ. Code art. 2046. "A party who demands performance of an obligation must
5 prove the existence of the obligation." La. Civ. Code art. 1831; *see* Louisiana Gaming Corp. v. Rob's
6 Mini-Mart, Inc. 666 So.2d 1268, 1270 (La. App. 2nd Cir. 1996)("The party claiming rights under the
7 contract bears the burden of proof."); Woodward v. Felts, 573 So.2d 1312, 1315 (La. App. 2d Cir.
8 1991)("The party who asserts an obligation must prove it by a preponderance of the evidence.").
9 Thus, KMC bears the burden of proving the existence of an obligation on the part of BellSouth to
10 pay reciprocal compensation for ISP traffic under the KMC Agreement.

11 The provisions of the KMC Agreement provide that the parties are required to pay reciprocal
12 compensation to each other only for the transport and termination of "Local Traffic" as defined in the
13 KMC Agreement, and that "Switched Exchange Access Traffic" is expressly excluded from the terms
14 of that obligation. *See* Factual Findings 7&8. Thus, KMC bore the burden of proving (1) that it
15 "transports" the ISP traffic for which it claims reciprocal compensation, (2) that it "terminates" this
16 ISP traffic on its network, (3) that such traffic falls within the definition of "Local Traffic" as defined
17 in the KMC Agreement, and (4) that such traffic is not "Switched Exchange Access Traffic," as
18 defined in the KMC Agreement.

19
20 ***ISP Traffic Does Not "Terminate" Locally.***

21 One of the major disputes in this matter has been over whether ISP traffic "terminates" locally.
22 When KMC initially filed its Complaint that established this docket, KMC argued that ISP traffic
23 constituted "two components, a telecommunications component and an information services
24 component." Complaint, ¶42. This argument is typically referred to as the "two-call model." KMC
25 argued initially that the telecommunications component "terminated" locally at the ISP server. After
26 the filing of its Complaint, the FCC issued its *Declaratory Ruling* on ISP traffic in which it stated
27 unequivocally that ISP traffic does not terminate locally at the ISP server, but rather continues on to
28 distant websites outside of the local calling area. *See Declaratory Ruling*, ¶12. The FCC based its
29 determination on a consistent line of prior precedent dating back several decades. Further, the FCC

1 expressly considered and rejected the "two-call model," noting that its prior precedent has established
2 a consistent, end-to-end analysis for determining where the call originates and terminates. In the
3 Matter of Southwestern Bell Tel. Co., CC Docket No. 88-180, Order Designating Issues for
4 Investigation, 3 FCC Rcd 2339, 2341 (1988)("[T]he jurisdictional nature of a call is determined by
5 its ultimate origination and termination, and not ... its intermediate routing." Emphasis added.);
6 BellSouth Memory Call, Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth
7 Corporation, 7 FCC Rcd 1619, 1620(1992) ("there is a continuous path of communications across
8 state lines between the caller and the voice mail service."); Teleconnect, Teleconnect Co. v. Bell
9 Telephone Co. of Penn., E-88-83, 10 FCC 1626, 1629 (1995), aff'd sub nom. Southwestern Bell Tel.
10 Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997)("[B]oth court and Commission decisions have considered
11 the end-to-end nature of the communications more significant than the facilities used to complete such
12 communications. According to these precedents, we regulate an interstate wire communications
13 under the Communications Act from its inception to its completion. [A]n interstate communication
14 does not end at an intermediate switch. . . . The interstate communication itself extends from the
15 inception of a call to its completion, regardless of any intermediate facilities.").

16 After the issuance of the *Declaratory Ruling*, KMC abandoned its reliance on the "two-call
17 model," and began to argue that for "regulatory purposes" ISP traffic is "treated" as terminating
18 locally. In support of this new argument, KMC relies on general statements in the FCC's *Declaratory*
19 *Ruling* and ¶1040 of the FCC Interconnection Order. First Report and Order, In the Matter of
20 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC
21 Docket No. 96-98, 11 F.C.C. Rcd. 15499 (August 8, 1996)("FCC Interconnection Order").

22 The *Declaratory Ruling* provides no support for KMC's claim; the FCC stated expressly that
23 "the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs
24 contend, but continue to the ultimate destination or destinations, specifically at a Internet website that
25 is often located in another state." *Declaratory Ruling*, ¶12. As further support for the finding that
26 a call has only one point of termination, the FCC recognized that its "conclusion that ISP-bound
27 traffic is largely interstate might cause some state commissions to re-examine their conclusion that
28 reciprocal compensation is due to the extent that those conclusions are based on a finding that this
29 traffic terminates at an ISP server" Id. ¶27. Emphasis added. Thus, it cannot be seriously argued

1 that ISP traffic has more than one point of termination or that it actually does terminate locally at the
2 ISP server, even though the FCC has stated emphatically that it does not.

3 For these very reasons, it is impossible to square KMC's interpretation of ¶1040 of the FCC
4 Interconnection Order with the findings in the *Declaratory Ruling*. Indeed, if ISP traffic did
5 terminate locally under KMC's interpretation of ¶1040, reciprocal compensation would be owed as
6 a matter of law pursuant to section 251(b)(5) of the 1996 Act. It is undisputed, however, that
7 reciprocal compensation is not required by law for this traffic. See *Declaratory Ruling*, ¶26, n.87
8 ("[T]he reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51,
9 Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications
10 Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic.")⁵

11 Finally, KMC points to certain statements made by BellSouth in which it misuses the term
12 "terminates." Such misuses do not affect the interpretation of the Agreement. Article 2047 of
13 Louisiana's Code of Civil Procedure provides that "[w]ords of art and technical terms must be given
14 their technical meaning when the contract involves a technical matter." The termination requirement
15 has only one technical meaning, as recently confirmed by the FCC, and that is the ultimate end point
16 of the communication. Thus, KMC has failed to carry its burden of proving that it actually does
17 "terminate" ISP traffic on its network as is required by the reciprocal compensation obligation of the
18 Agreement.

19
20 ***ISPs Provide Switched Exchange Access Service.***

21 As previously stated, BST and KMC expressly excluded Switched Exchange Access Services
22 from the reciprocal compensation obligation of the KMC Agreement. BST argues that ISPs provide
23 switched exchange access services to their subscribers and that such traffic is therefore expressly
24 excluded from the reciprocal compensation obligation of the Agreement. BST's claims are based
25 upon the prior rulings of the FCC regarding Enhanced Service Providers ("ESPs"), of which ISPs are

⁵The FCC Interconnection Order interpreted the scope of the reciprocal compensation obligation:
"We conclude that section 251(b)(5)'s reciprocal compensation obligations should apply only to
traffic that originates and terminates within a local calling area. . . .

....
We find that the reciprocal compensation provisions of section 251(b)(5) for transport and
termination of traffic do not apply to transport or termination of interstate or intrastate interexchange
traffic."

1 a subset. *See Declaratory Ruling*, ¶1, n.1. In response, KMC claimed that ISP traffic is not expressly
2 excluded in the Agreement. Likewise, the Administrative Law Judge did not consider whether ISP
3 traffic is switched exchange access traffic, but rather focused on the fact that a specific ISP exception
4 was not included in the KMC Agreement.

5 This Commission chooses to consider the actual terms of the KMC Agreement, rather than
6 speculate as to what terms could have been in the KMC Agreement. The FCC has recognized since
7 the inception of the access charge regime that ESPs use switched exchange access services. In the
8 MTS/WATS Market Structure Order, the FCC found that ESPs use interstate access service and
9 exempted ESPs from paying access charges. MTS and WATS Market Structure, CC Docket No.
10 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983)("Market Structure
11 Order")("Among the variety of users of access service are ... enhanced service providers"). *See also*,
12 Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC
13 Docket No. 87-215, Order, 2 FCC Rcd. 4305, 4306 (1987)(ESPs, "like facilities-based interexchange
14 carriers and resellers, use the local network to provide interstate services"); Amendments of Part 69
15 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order,
16 3 FCC Rcd 2631 (1988)(ESP Exemption Order)(FCC refers to "certain classes of exchange access
17 users, including enhanced service providers").

18 The FCC confirmed the status of those services provided by ESPs, including ISPs, in its
19 recent *Declaratory Ruling*: "Although the Commission has recognized that enhanced service
20 providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs
21 from the payment of certain interstate access charges. . . . Thus, ESPs generally pay local business
22 rates and interstate subscriber line charges for their switched access connections to local exchange
23 company central offices." *Declaratory Ruling*, ¶5 (Emphasis added).

24 In light of the above quoted FCC precedent that has found consistently that ISPs use switched
25 exchange access services, such services do fall within the exception contained in Section 5.8.3 of the
26 KMC Agreement. *See Factual Finding No. 7*.

The KMC Agreement Provides that the Parties Intended to do Nothing More Than the 1996 Act Required.

Any doubt as to the parties' intent, as expressed in the KMC Agreement, regarding the scope of the reciprocal compensation obligation is removed by the express statements regarding intent found in Sections 1.59 and 1.6 of that Agreement. See Factual Finding No. 8. Given that the parties expressly state that the reciprocal compensation obligation in the Agreement is "as described in or required by the [1996] Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC," it is clear that the parties intended to do nothing more or less than the 1996 Act required. As previously stated, the 1996 Act does not obligate the parties to pay reciprocal compensation for any non-local, interstate traffic. The administrative law judge did not analyze these provisions of the KMC Agreement in reaching the conclusions contained in the proposed and final recommendations.

KMC Failed to Produce Extrinsic Evidence that the Parties Intended to Pay Reciprocal Compensation for ISP traffic.

Even if the terms of the reciprocal compensation obligation of the Agreement were found to be ambiguous, KMC failed to meet its burden of producing sufficient extrinsic evidence to establish that the parties mutually intended to pay reciprocal compensation for non-local, ISP traffic. The only representative of KMC that was responsible for deciding the terms of the interconnection agreement to be entered with BST, Ms. Tricia Breckenridge, testified that (1) neither she nor anyone else at KMC had any conversations with BST regarding the terms of the interconnection agreement (Hearing Transcript, pp. 24, 27), (2) she chose to opt into an agreement that some other company had negotiated with BST rather than negotiate her own agreement (Id. pp. 27-28), (3) she did not read the agreement that she chose to opt into (Id. p. 29), and (4) she was not looking specifically at reciprocal compensation issues when she was deciding what agreement to opt into. Id.

In light of the sworn testimony of the KMC witness, it is difficult to conceive of how KMC is in a position to claim the benefit of any possible ambiguity in the KMC Agreement, given the cavalier attitude that KMC took in entering the Agreement. Ms. Breckenridge claimed that she relied on various unspecified FCC orders and the fact that BST "treated" ISP traffic as local for other purposes and thus assumed that it would be "treated" as local for purposes of reciprocal

1 compensation. Ms. Breckenridge could not, however, specifically identify what FCC orders she
2 actually relied upon. Even if Ms. Breckenridge was relying upon any specific FCC orders, it is clear
3 that her interpretation of those orders was incorrect.

4 Not only did BST properly interpret the prior FCC rulings regarding the nature of ISP traffic,
5 BST presented other extrinsic evidence to establish that it never intended to pay reciprocal
6 compensation for non-local, ISP traffic and that it would never have agreed to pay reciprocal
7 compensation for such traffic due to the negative economic consequences that such an arrangement
8 would have ensured.

9 First, BST presented uncontroverted evidence of the efforts that it undertook to ensure that
10 it did not bill any CLECs reciprocal compensation for ISP traffic, or any other non-local traffic. In
11 October 1995, BST began holding all reciprocal compensation billings to CLECs, including reciprocal
12 compensation billings for local traffic. Prior to entering the KMC Agreement, BST had identified a
13 method to ensure that it would not bill reciprocal compensation for ISP traffic and was working to
14 implement the enhancement to its billing system. This enhancement was implemented in September
15 of 1997, before KMC had even begun billing BST for reciprocal compensation, and BST wrote off
16 most all of the prior traffic that it had withheld from reciprocal compensation billing.

17 The uncontroverted evidence establishes that BST never knowingly billed or paid reciprocal
18 compensation for ISP traffic. These facts distinguish this case from the numerous other cases upon
19 which KMC cites and relies. Other Regional Bell Operating Companies ("RBOCs") did not
20 undertake any effort to identify or separate out ISP traffic. Indeed, some RBOCs had established a
21 course of conduct of billing and paying reciprocal compensation for several months before informing
22 CLECs that they would no longer pay reciprocal compensation for ISP traffic.

23 Finally, BST put forth evidence that it would not have agreed to pay reciprocal compensation
24 for ISP traffic because such an arrangement would have certainly resulted in economic harm to BST.
25 Given that CLECs such as KMC primarily, if not exclusively, serve business customers including
26 ISPs, while BST serves the vast majority of internet end-users, paying reciprocal compensation on
27 ISP traffic would result in absurd amounts of reciprocal compensation flowing to the CLECs.
28 Indeed, in this particular case, KMC billed BST reciprocal compensation for ISP traffic that was
29 approximately 340% more than KMC received in revenue from providing actual service to its ten (10)

1 ISP customers in Louisiana. *See* Factual Findings Nos. 11-13. The negative impact on competition
2 in the local market as well as the potential for abusing the reciprocal compensation obligation from
3 permitting such an arrangement are obvious.

4 In response, KMC claims that if it does not receive reciprocal compensation for ISP traffic
5 from BST, it will be providing a service to BST for free and will incur certain uncompensated costs.
6 KMC did not put forth any evidence as to the nature or amount of these costs that KMC claimed
7 would go uncompensated and the Commission refuses to simply take KMC's word at face value.

8 Docket Number U-23839 was considered and decided at the Commission's October 13, 1999
9 Business and Executive Session. On substitute motion of Commissioner Blossman and seconded by
10 Commissioner Sittig, with Commissioner Dixon concurring and Commissioners Owen and Field
11 dissenting, the Commission voted to reject the Administrative Law Judge's Recommendation and
12 adopted the Staff Recommendation to reject KMC's claim for reciprocal compensation for ISP-bound
13 traffic.

14 **IT IS THEREFORE ORDERED**

15 That KMC's request for payment of reciprocal compensation for ISP-bound traffic is
16 hereby denied.
17

18
19 **BY ORDER OF THE COMMISSION**
20 **BATON ROUGE, LOUISIANA**
21 **October 28, 1999**

22 /S/ C. DALE SITTIG
23 DISTRICT IV
24 CHAIRMAN C. DALE SITTIG

25 /S/ JACK "JAY" A. BLOSSMAN, JR.
26 DISTRICT I
27 VICE CHAIRMAN JACK "JAY" A. BLOSSMAN, JR.

28 DON OWEN (DISSENTING)
29 DISTRICT V
30 COMMISSIONER DON OWEN

31 /S/ IRMA MUSE DIXON
32 DISTRICT III
33 COMMISSIONER IRMA MUSE DIXON

34
35 /S/ LAWRENCE C. ST. BLANC
36 SECRETARY
37 LAWRENCE C. ST. BLANC

38 JAMES M. FIELD (DISSENTING)
39 DISTRICT II
40 COMMISSIONER JAMES M. FIELD
41
42

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight

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A handwritten signature in black ink, appearing to be "H. Walker", written over a horizontal line.